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IN THE

Supreme Court of the United States

October Term, 1945

No. 693

BARNEY E. GASKILL, Et Al.,
Petitioners,

vs.

CLAUDE A. ROTH, Trustee of the Property of the Chicago & North Western Railway Company, Et Al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Law Briefs—Omaha Legal Blue Printing Co.—413 So. 15th St.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners believe that in order to simplify the presentation of the facts in this case, because the record is voluminous, we feel it will aid this Court in determining what is involved in this proceeding by adopting the opin-

ion of the Court beginning on page 6 of the C. C. A. printed record and up to the bottom of page 9 of said record, as a fair presentation of the questions involved and the contentions of the parties. That part of Judge Woodrough's opinion is as follows:

(Par. 1) "This action was brought May 8, 1939, by forty-one conductors and brakemen employed by the Chicago and North Western Railway Company in its Eastern or Nebraska Division against the railroad and one Kimball, an employee of the road in its Sioux City Division. The Order of Railway Conductors and Brotherhood of Railroad Trainmen were also made parties defendant. After hearing, the case was dismissed and decision of this court on appeal reversing the dismissal, which includes a statement of the nature of the action, is reported in 119 F. 2d 105. On certiorari the Supreme Court remanded the case to the District Court without prejudice to an application for leave to amend the bill of complaint. 315 U. S. 442. Amended pleadings were filed and the case proceeded to final judgment by the terms of which it was again dismissed in accordance with the court's complete findings and conclusions which were against the plaintiffs. This second appeal has been taken by the plaintiffs to reverse that judgment.

(Par. 2) "In its substance the claim of the plaintiffs is that by virtue of the Agreement (referred to as Exhibits "A" and "B") entered into between the North Western Railway Company and the Brotherhood of Railroad Trainmen and the Order of Railway Conductors under which the plaintiffs work for the North Western railway (the relevant parts of which are set out in the amended pleadings), the plaintiffs have had and have the right to participate in doing a certain percentage of the work in an order of seniority among themselves over that certain railroad trackage from Omaha, Nebraska, through Blair, Nebraska, to California Junction, Iowa (being part of certain runs

between Omaha and Sioux City, Iowa), and that the North Western has breached and will continue to breach the contract by diverting their part of the work from the conductors and brakemen of the North Western's Nebraska Division, including the plaintiffs, to conductors and brakemen of the Sioux City Division of the North Western. The plaintiff's claim of right to perform the work is rested on the contention that the trackage described is and has been a part of the Nebraska Division of the North Western railroad, and that the railroad's operations over that trackage into and from the Sioux City Division of the railroad are inter-division operations and that the said Agreement accords the plaintiffs, as conductors and brakemen of the Nebraska Division, a right to participate in the inter-division work and in the work of said operations.

(Par. 3) "The position of the North Western is that the trackage between Omaha and Blair (which includes about 24 miles of the total 31 miles of the described trackage) belongs to the Chicago, St. Paul, Minneapolis and Omaha Railway Company (referred to as the M. & O.), and is not and has never been a part of the Nebraska Division of the North Western, and that the Agreement *does not award any proportion of the work in question to the class of workmen to which the plaintiffs belong.* The line of the M. & O. from Omaha to Sioux City is on the west side of the Missouri river, which it crosses at Sioux City. The North Western's line is practically parallel on the east side of the river, but as it does not reach to Omaha, its Omaha-Sioux City traffic has been moved into and out of Omaha during different periods over different railroads. Since 1930 it has moved over the described trackage of the M. & O. railroad. The North Western and the M. & O. railroads are distinct and separate entities and are so operated. On May 1, 1930, the North Western and the M. & O. adopted and put *into effect a new plan* for the handling of the

traffic of the two roads between Omaha and Sioux City under which the trackage of the M. & O. in question here is used between Omaha and Blair, but the volume of transportation on the M. & O. as a whole was reduced and that on the North Western was increased. The change became necessary for economical operation, in that the M. & O. Omaha-Sioux City line is longer and its grades and curves heavier than on the North Western, and much larger trains move over the North Western. The change affected the amount of work to be done on the respective roads, but it was put into effect and has been carried out since August 19, 1930, in full recognition by the railroads of their *collectively bargained labor agreements*, including the *Agreement of the North Western on which the plaintiffs rely.* Neither of the two railroads has at any time denied the existence or validity of said agreements, nor that such rights to work as are granted to their respective employees by the terms of the agreements inure to all the employees in the classes designated (whether they are members of the unions or not), but the change in the operations of the two railroads affecting the amount of work available to certain men resulted in disputes among the men as to the division of the work among them. The *North Western's position is that all of such disputes, including the claims asserted by plaintiffs in this action*, have been submitted to and considered by the officers and tribuials authorized under the Agreement, that the work *has been allotted* in accordance with the decisions of such authorities *agreed to by the railroads*, and that such decisions so agreed to constitute the collective bargain agreement applicable to the particular Omaha-Sioux City operations of the two railroads here involved.

(Par. 4) "The defendants Order and Brotherhood also pleaded and assert that the claims of the plaintiffs herein have been duly determined against them by the decisions, rulings and interpretations of

> the representatives of the class and craft of conductors and trainmen, the Grand Lodge officers of the Order and of the Brotherhood and the highest tribunals thereof, and that plaintiffs are bound by the action of their authorized representatives and *have no right as a class or individually to maintain the action.*"

It is our contention that the paragraph, top of page 10 of C. C. A. printed record, in which the Court stated, "that all the evidence was taken and ruling was requested first on the issue as to whether or not there was a breach of the agreement by the North Western causing damage to plaintiffs," is not quite an accurate statement as to the procedure.

The record shows that the petitioners at all times were demanding an audit of the books of the company to determine exactly the amount of work that was lost by the petitioners, but the trial Court suggested that we proceed with the evidence in so far as to determine whether or not the so-called "bargaining agreements" referred to in this record settled, as claimed by the respondents, the questions involved here, and whether that fact would determine that the plaintiffs were not entitled to any remedy. Therefore, if the Court decided in favor of plaintiffs he would order an audit, but if he should determine that the record sustained the claim of the defendants that these matters were settled by the collective bargaining agent, and they had authority to settle the claims, this would necessitate the expense of having an audit. Therefore, no evidence was submitted as to the amount of the work done by plaintiffs over the disputed mileage. That matter was reserved until the Court passed on the preliminary questions above referred to.

It was always our claim that if an audit had been had, even as we requested before, this case went up as above

set forth on the preliminary hearing on the question of jurisdiction, it would have disclosed the amount of damage that we sustained, the number of miles the Sioux City Division did over the disputed trackage that we were entitled to, and the names and amount of loss that each one of the plaintiffs sustained; but the Court thought the other procedure better, and the Court adopted that method rather than, as stated by Judge Woodrough in his opinion, that all the evidence was taken and ruling *requested* first on the question whether there was a breach of the agreement by the North Western causing damage to plaintiffs.

The Findings of Facts and Conclusions of Law on which the District Court passed its judgment of dismissal are appended and found beginning page 10 of the C. C. A. printed record. As stated by Judge Woodrough at the top page 11 of said record, appellants contended in the Circuit Court that the trial Court was clearly in error in finding that the agreements on which plaintiffs' actions were based limited the seniority rights of the plaintiffs to the division of the North Western Railroad on which they were employed, and in finding that the M. & O. trackage between Omaha and Blair, used in the Omaha and Sioux City runs in controversy, is not a part of the Nebraska Division of the Northwestern Railroad, seniority district.

It is our further contention that this record will show that prior to this new attempted agreement May 1, 1930, all of the 31 miles in controversy was, and has been for several years, treated as a part of the Nebraska Division of the Northwestern, irrespective of the fact that the 24 and a fraction miles was leased rather than owned by the railroad, and that the Nebraska Division, plaintiffs herein, of the Northwestern Railway did all the work of the Northwestern that was carried over that 24 miles of

track from Omaha to Blair and 7½ miles of track from Blair to California Junction. That prior to the new agreement this record shows that all the work, both of the M. & O. and of the Northwestern Railroad, was done solely by crews of the Northwestern Railroad, and that this controversy arose because the employees of the M. & O. claimed that they should participate in the doing of this work, and that after considerable negotiations it was finally agreed that the joint work of both roads should be divided between the M. & O. employees, by them taking *25%* of the work, and the Northwestern taking the remaining *75%*. As found by the last part of Par. 3 of the District Court findings of fact, that prior to the inauguration of these runs the Nebraska Division of the Chicago & Northwestern *never* operated any trains on the *Sioux City Division* of the road, and likewise the Sioux City Division men of that railroad never operated any trains on the Nebraska Division of that railroad.

We also contend that this record shows that the so-called agreement did not hold, as held by the District Court's decision and by the Circuit Court's decision, that that work that was done under this new agreement was *not inter-divisional* runs, but that they simply held, that the joint work of both the M. & O. and the Northwestern was inter-railroad service, and that work only should be apportioned on the 75% and 25% basis generally between the employees of the M. & O. and the employees of the Northwestern.

There is no evidence in the record to show that that agreement of May 1, 1930, *pretended to determine who should do the 75% remaining of the Northwestern work carried on by the Northwestern* from Omaha to Blair over the *24 and a fraction miles,* and then from Blair to Califor-

nia Junction over the 7½ *miles* belonging outright to the Northwestern.

This record does not show, as found by the District Court and Circuit Court of Appeals, that that work was assigned by that agreement to the *Sioux City Division of the Northwestern.*

That this record does show that that work just described runs over two *seniority districts,* and should be divided on a mileage percentage basis, and that as the mileage from Omaha over the leased tracks to Blair and from Blair to California Junction, Iowa, was 30% of the mileage from Omaha to Sioux City and as the mileage from California Junction to Sioux City was 70% of the total mileage from Omaha to Sioux City, this work should be divided on a 30% to 70% basis between the Nebraska Division of the Northwestern and the Sioux City Division of the Northwestern. That that question or dispute was *never submitted to the bargaining agents* for settlement, nor *never was attempted to be decided by them, notwithstanding the holding of the District Court and Circuit Court to the contrary.*

Petitioners also claim, as stated by Judge Woodrough, bottom page 13 C. C. A. record, of his opinion, that the evidence is to the effect that the brakemen and conductors of the Nebraska Division of the Northwestern have worked on the tracks of the M. & O. Railroad between Omaha and Blair prior to and since 1930.

We further contend that this record shows contrary to his statement at the top of page 14 of the C. C. A. record, that there is evidence to support appellants' contention that the Northwestern has accorded the Nebraska Di-

vision seniority rights over the M. & O. Railroad track, for the reason that it is stipulated in the record that the M. & O. tracks, operated over those tracks that have been leased under a 99-year lease as though they were owned by the Northwestern.

It is not true, as held by Judge Woodrough at top of page 14, additional proceedings, that Exhibits "A" and "B" did not accord them seniority rights.

Our contention being that it makes no difference whether the trains are operated over leased tracks or tracks actually owned by the railroad, the rights of the employees are just the same, and the evidence shows that at all times all the Northwestern work that was done over this track was done, prior to May 1, 1930, by the Nebraska Division's petitioners herein.

That it is stipulated in the record, as found by Judge Woodrough on page 14, additional proceedings, that prior to the inauguration of these runs in 1930 the Nebraska Division of the Chicago & Northwestern Railroad Company never operated any trains on the Sioux City Division of that railroad, and likewise the Sioux City Division men of that railroad never operated any trains on the Nebraska Division of that railroad, but since that date the record shows that the Sioux City Division, not by virtue of any agreement submitted to the bargaining agent but by the arbitrary decision of the Northwestern itself, has been doing all of the Northwestern work from Sioux City to Omaha over the track here in controversy, which runs through two seniority districts.

It is our contention that the record also shows that the 7½ miles as shown by this record to always have been for

years a part of the Nebraska Division of the Northwestern, and since May, 1930, this work has been taken away from the Nebraska Division and given to the Sioux City Division of the Northwestern, not by virtue of any bargaining agreement.

Petitioners' further contention is with reference to the decision of Judge Woodrough, beginning on bottom of page 17 of additional proceedings, with reference to the 7½ miles, that there was some inter-divisional run on the short distance of 5.9 miles between California Junction and Missouri Valley, which Judge Woodrough assumed was Sioux City Division, but the record here shows that that 5.9 miles was also part of the Nebraska Division of the Northwestern, but as that 5.9 miles was not traveled on the trips from Omaha to California Junction to Sioux City that was not involved in this controversy.

To sustain our statement as to what the record shows, it is stipulated (Ex. 11, Stip. 11) that the line from California Junction to Sioux City, Iowa, was and is owned by the Chicago & Northwestern Railroad Company, and was until very recently a part of the Sioux City Division of the Northwestern (R. 110).

At page 162 (original record) O. G. Jones, General Chairman of the B. of R. T., stated, "that the *Nebraska Division* includes the *trackage* 5.9 miles between Missouri Valley and California Junction."

Exhibit 1 (R. 36) recites "that the adjustment of disputes between employees of the two properties is not the subject of formal agreements supplementing the current schedules."

It is stipulated (Ex. 1, Stip. 1, R. 75) that the F. E. & M. V. R. R. exercised its contract rights to operate trains over leased tracks until 1903 by, general deed, the F. E. & M. V. R. R. conveyed all its property and rights to the Northwestern and after the date of such deed the Northwestern has from time to time operated trains over this piece of track between Omaha and Blair, Nebraska, in accordance with said contract since 1888.

Exhibit 11 (R. 141) and Stipulation (Par. 7, R. 146) stated, "that prior to and since May 1, 1930, Nebraska Division crews have manned trains over this leased track between Omaha and Blair, Nebraska," and Exhibit 12, Stipulation 12, (R. 141, original record), stated employees of the Northwestern holding seniority rights on the Sioux City Division in engine and train service did not perform any work between California Junction and Omaha via Blair, and also prior to said date employees holding seniority on the Nebraska Division, formerly Eastern Division, did not perform any work between California Junction and Sioux City, Iowa, on the Sioux City Division of said railroad. In other words, as Mr. Dressler, representing the Northwestern, stated, "The Sioux City fellows did not come to Omaha, and the Omaha fellows did not go to Sioux City."

Now the Sioux City Division comes clear from Sioux City to Omaha, *doing all the work on both seniority districts.*

At Stipulation Exhibit 3, bottom of page 94, original record, Exhibit 3 (a) shows the *Eastern Division,* which is now the *Nebraska Division* of the Northwestern, includes 24.7 miles of track between *Blair* and *Omaha* designated as *M. & O. Railroad leased.*

In Exhibit 21, page 154 original record, it is stipulated that the Northwestern has trackage rights for the operation of their trains between Blair and Omaha, Nebraska, and have for 48 years exercised that right.

In Exhibit 11, page 127 original record, Mr. Sargent, President of the Northwestern, stated "that in making this decision (referring to this settlement of 1930) that the Northwestern does not concede as a matter of right any portion of the work to the employees of the Omaha Company since the entire business from No. Omaha to Sioux City via California Junction is Northwestern Railroad business. The decision in this case cannot be treated as a precedent covering any future cases, but is rendered because of the desire of both companies to meet the requests of the organization in matters where the organizations have mutually agreed with reference thereto."

Again at the bottom of the same page it is stated, "that for more than 40 years So. Platte and the Eastern Division crews, now Nebraska crews, operating in turn around service between *Mo. Valley* and No. Omaha handling purely Northwestern traffic between these points in either direction." On or about April 1, 1933, one of these Eastern Division crews was eliminated, and train operations changed so that this traffic was moved by the Sioux City Division, or a M. & O. crew operating over the Sioux City Division between Missouri Valley and Omaha.

The actual decision between the M. & O. and Northwestern employees decided is found at the bottom of page 29, original record, and simply finds "that after due consideration the agreement was reached that this service *as between the two roads* as now operated constitutes *inter-railroad service*, and the crew should be apportioned

on the respective lines on the basis that the ratio of miles run on each property in the operation of this service bears to the total miles made by all trains in the operation of this service."

There is *no finding* in this statement that the work to be done by the Northwestern was *not inter-divisional runs,* as the decision of Judge Donohoe and Judge Woodrough *held.*

At page 174, original record, an affidavit of F. M. Nemitz, Vice-President of the O. R. C., states, "that the seniority divisions and the railroad divisions *are not always the same.*"

Exhibit 11, Stipulation 11, page 110, recites, "that the decision of the unions was communicated to the management of both roads to the effect that the runs in controversy should be divided on a basis of *25%* to the employees of the *M. & O.,* and *75%* to the *employees of the Northwestern.*"

There is nothing in the record to show that the 75% assigned to the Northwestern was to be manned solely by the *Sioux City Division* of the Northwestern.

In Exhibit 18, page 147, original record, Mr. Pangle, Assistant to the President of the Northwestern, states, "that the Nebraska Division employees of the Northwestern should be given a run between Omaha and Sioux City in the pool 261 days a year in order to equalize the work which the *Nebraska Division* has *lost* due to the *Sioux City Division* taking over the work between Omaha and Missouri Valley."

At the top of R. page 147, original record, he admits "that as a result of change in method of handling round-up

cars between Missouri Valley and North Omaha, as well as other *service formerly handled by the Nebraska Division crew,* a check has been made to determine what adjustment should be made in assignment of men on account of work between Missouri Valley and No. Omaha *formerly assigned to Nebraska Division employees* being *assigned to the Sioux City Division employees.*"

Clearly showing that the Nebraska Division did this work now assigned to the Sioux City Division simply by the arbitrary action of the railroad, and not as a result of any bargaining agreement.

At page 164, original printed record, it is stated by O. G. Jones, general chairman of B. of R. T., "that the term '*seniority*' used in this and similar cases and applied to railroad operations means *age in service* in a particular craft, and as applied to the craft of brakemen it means the date when the brakemen begins service, and as to the conductors it means the date when he was promoted and began service as a conductor. *Seniority rights,* as they are sometimes called, is limited to a *seniority district,* which is definitely *defined as a portion of a railroad.*"

At page 196, printed record (Ex. 11, Par. 7), it was stipulated and agreed that for many years and at the present time there are operated regularly scheduled freight trains operating between Lincoln, Nebraska, and Missouri Valley, Iowa, which run Lincoln to Fremont, Fremont to Omaha, over the Northwestern tracks. *Omaha to Blair over the M. & O. tracks.* Blair to Missouri Valley over the Northwestern tracks and return over the same route.

That if business conditions required it, extra trains over said route are operated; all of such trains are and

have been, prior to and since May 1, 1930, manned exclusively by *employees of the Nebraska Division of the Northwestern,* while it is further stipulated that said trains are not the *trains* involved in the controversy between Sioux City and Omaha, but are in addition to such trains. This stipulation shows that this *trackage from Omaha to Blair* belonging to the *M. & O.* was part of the *trackage* over which the *Northwestern* traveled in conducting its business.

At the bottom of page 146, original record (Ex. 18), M. E. Pangle, Assistant to the President of the Northwestern, states, "that the Sioux City Division will be ordered to connect with the Iowa Division and handle round up cars to North Omaha, turn at Omaha and handle the time freight north to Sioux City. The Nebraska Division to discontinue the operation of their crew to handle round up cars."

At the top of page 147, original record, it is further admitted in the letter, "that as the result of this change of handling the round up between *Missouri Valley and No. Omaha,* as well as other service *handled by Nebraska division crews,* a check has been made to determine what adjustment should be made in the assignment of men on account of work between Missouri Valley and No. Omaha *formerly assigned to Nebraska division employees being assigned to the Sioux City division employees.*"

It was thereby admitted that the Nebraska Division employees have been deprived of this work as a result of the Sioux City Division employees taking the handling of work between *Missouri Valley and North Omaha,* all of which includes the leased track from *Blair* to *Omaha,* Nebraska, over the *M. & O.*

At page 151, original record, it is shown that when this complaint by the M. & O. people was made that they should have part of this work they stated, "We have been deprived of work by you allowing the Northwestern men to do it, and we want to be paid," and the officers refused and said, "No, that *track* from *Omaha* to *Blair is under lease,* and *they have as much right to use it as we have.*"

At the bottom of page 154, original record, the *M. & O.* claimed that the Northwestern Railroad were, under their contracts with their men, obliged to use their own pilot conductors, as under the contract entered into between the two railroad companies in 1888 the Northwestern had *trackage rights* for the operation of *their trains* between *Blair* and *Omaha,* and *have for 48 years exercised that right. They have just as much right to operate over this piece of track as if they owned half of it* (original record, top page 55).

The committee of the union when they were settling the controversy state (original record, page 155) that the *Northwestern crews* were being used to operate extra trains from *Omaha* to *Blair* and return, and handle tonnage of *both the Northwestern* and the *M. & O.*

Further down on the same page it is stated that the claim of the *M. & O.* employees was allowed for the reason the Northwestern crew in their operation handled *M. & O. Railway business* which belonged to the *M. & O. crews.*

At the bottom of page 157, original record, the union sought to introduce the Constitution and By-Laws of the O. of R. T. and B. of R. T. relating to procedure. This was objected to by petitioners on the ground that the contracts, Exhibits "A" and "B", set up in the petition

and by stipulation constituted the complete contract, and involved all those employees of the Northwestern *whether they belonged to the union or not.*

Jurisdictional Statement

The judgment affirming the District Court's opinion was filed the 19th day of October, 1945. Petition for rehearing was denied on the 7th day of November, 1945.

Jurisdiction of this Court to review this decision is claimed under Sec. 240, Title 28, Par. 347, U. S. Code, as amended, and Rule 38 of Rules of the Circuit Court of the United States, Sec. 5(b).

Questions Presented

The questions presented and reasons relied upon for allowance of writ are:

1. Whether the Court was right in its opinion in holding that the bargaining agents referred to in the opinion settled the questions involved in this controversy.

2. Whether the Court in its opinion erred in not holding that even though the bargaining agents would attempt to settle this controversy, that such bargaining agents, as such, have no right to take away from plaintiffs their seniority rights, which are property rights, without showing that the individual employees affected authorized the bargaining agents to settle this dispute.

3. That for the bargaining agents and the railroads to attempt to deprive the petitioners of their rights without notice would be a violation of the

Fifth Amendment of the United States Constitution under the due process of law provision.

4. Whether or not the Court erred in not passing upon the questions that these petitioners raised, that the state of Nebraska had held in *Rentschler v. Mo. Pac. R. R.*, 126 Neb. 493, 253 N. W. 693, 95 A. L. R. 1, "that these seniority rights were property rights, and once acquired could not be taken away from them by any agreement between the railroad and bargaining agent," and provisions that required the employees to submit to arbitration their private rights without the right to resort to the Court is void as against public policy. That the Supreme Court in the case of *Erie v. Tompkins,* 304 U. S. 644, 58 S. C. R. 817, 114 A. L. R. 487, held the Federal Court was bound by the local decision of the State Court, and in *Moore v. Ill. Central R. R.,* 312 U. S. 630, 61 S. C. R. 754, 84 L. Ed. 1099, it was squarely held, "that a decision involving seniority rights which construed the contract before the matter was submitted to the Federal Court was binding on the Federal Court."

5. Whether or not the decision in this case is in harmony with the recent decisions of the Supreme Court in *Elgin-Joliet R. R. v. Burley,* 89 L. Ed. Adv. Opinion 17, page 1328; *Steele v. L. & N. R. Co.,* 323 U. S. 192; *Tunstall v. B. of L. F. & Enginemen, Ocean Lodge No. 76,* 89 L. Ed. 181, 65 S. C. R. 235; *J. I. Case Co. v. Natl. Rel. Board,* 88 L. Ed. 489, 64 S. C. R. 576, 321 U. S 332, which cases squarely hold that the bargaining agents as such have no right to determine the *property*

rights of the individual, in the absence of proof that the controversy was submitted to them by the individual, and agreement made to abide by such decision. *Nord v. Griffin,* 86 Fed (2d) 481 (7th Cir.).

6. Whether or not the decision relied upon by the Court in its opinion, *Div. 525, Order of R. R. Conductors v. Gorman,* 133 Fed. (2d) 273, is out of harmony with the decision of the Supreme Court of the United States just referred to in the above paragraph, and is clearly distinguishable from the Rentschler case, in that in the Gorman case there was no previous local decision, as there was here in the Rentschler case, construing the collective bargaining agreement, and it is in conflict with the Elgin, Steele and Tunstall cases. (Bottom page 17, C. C. A. Record.)

Reasons Relied Upon as Set out in Rule 38, Par. 5(b)

1. This decision has decided an important question of local law, which is in conflict with the applicable local decisions in the Rentschler case above referred to.

2. That it has decided a Federal question in conflict with the applicable decisions of this Court cited above.

3. This opinion has departed from the accepted and judicial proceedings, in that it has held in violation of the above due process clause of the Fifth Amendment of the United States, and has so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision in violation of the due process clause of the Fifth Amendment of the United States.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals, 8th Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record, and the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket as No. 13,055, Barney E. Gaskill, et al., Appellants, vs. Claude A. Roth, Trustee of the Property of the Chicago and North Western Railway Company, et al., Appellees, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court and have such and other further relief as to the Court may seem proper.

S. L. WINTERS,
GEORGE O. BURGER,
Counsel for Petitioners.

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CLAUDE A. ROTH, Trustee of the Property of the Chicago & North Western Railway Company, Et Al.,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The opinion of the Circuit Court of Appeals for the 8th Circuit is found in the additional C. C. A. record, page 6.

As previously stated in this record the opinion of Judge Woodrough, which is found on page 7 of the additional printed C. C. A. record, shows the history of this case, and the substance of the claim of petitioners and defendant and of the Order of Brotherhoods, collective bar-

gaining agent, up until page 10 of his opinion, and on that page is appended the Finding of Facts and Conclusions of Law on which the Court based its judgment of dismissal, fairly states the history of this case and contentions of the parties.

On the top of page 11, it is true that we contended that the lower Court erred and now contend that the Circuit Court erred in finding that the seniority rights of plaintiffs were limited to the division of the Northwestern Railroad on which they were employed, and in finding that the M. & O. track between Omaha and Blair, used in the Omaha and Sioux City runs in controversy, is not a part of the seniority district of the Nebraska Division of employees of the Northwestern Railroad, so as to give them seniority rights on the leased trackage.

Without repeating the reference to the record that we have already set forth in this petition we state generally, now, that the record shows that seniority districts are not necessarily confined to Northwestern Railroad *Divisions.* That "seniority" means the right to do the work, as to trainmen, as of the date of their entering employment of the railroad, and as to conductors, as of the date of their promotion from trainmen to conductors over *certain trackage* over which the employees work, whether *owned by the railroad* or *leased by the railroad*, the *trackage* in this case being *31 and a fraction miles from Omaha to Blair on the Nebraska side,* from *Blair* to *California Junction,* on the Iowa side. That while the seniority district is generally confined to a division of the railroad, that is *not always true.* That this record shows that this 7½ miles from Blair to California Junction is, by stipulation and by the finding of the Court in its opinion, found to be *a part of*

the Nebraska Division of the Northwestern, so that there is no dispute as to that *mileage.* However, it is claimed by the railroad that the 24 and a fraction miles from Omaha to Blair is *not part of any seniority district* over which *any* of the employees of the Northwestern *have seniority rights,* because the *trackage* is not *owned* by the Northwestern, and both the District Court and Circuit Court held that *this trackage was not part of any seniority district.*

It is our contention that is contrary to all the record in this case, as this record shows that Northwestern employees for years have operated over that *trackage,* and that they had the same right as though they actually owned it.

It is stipulated, as shown above, that for years the Nebraska Division of the Northwestern, petitioners herein, have operated over this 24 and a fraction miles from Omaha to Sioux City, leased from the M. & O., and as far east as Missouri Valley, and *they are still doing that.*

The stipulation, however, stating that *trains* from Fremont to Omaha, and Omaha to Blair, and from Blair through California Junction to Missouri Valley, are not the *trains* involved in this controversy, and to that we have agreed, but we still contend that stipulation clearly shows that the *trackage* in controversy has always been manned and operated by the employees of the Nebraska Division of the Northwestern until this controversy arose.

It is stipulated that prior to May 1, 1930, the Sioux City Division never came nearer to Omaha than California Junction, Iowa, and the Nebraska Division never went farther than from Omaha to California Junction on the

route from Omaha through Blair to California Junction and to Sioux City, the route in controversy.

The record above shows that in statistical reports made by the railroad they reported this *24.7 miles of leased track as being part of* the Eastern or Nebraska Division of the Northwestern. The Court in its opinion said that they find provisions in Exhibits "A" and "B" that give them any seniority rights *over this trackage.*

"Seniority rights" have been claimed and operated over this railroad and others long before any collective bargaining agreements, and the bargaining agreements, Exhibits "A" and "B", are but continuations of like agreements that have been in force for years by these railroads.

Certainly, if the Nebraska Division, formerly Eastern Division, have always operated over this *disputed trackage,* and still operate some *trains,* it is the best evidence in the world that this 24 and a fraction miles was *part of the Nebraska seniority district* of the Northwestern, even though *owned* by the M. & O., but over which the Northwestern has operated under a lease for 48 years.

In *Wash. Term. Co. v. Boswell,* 87 L. Ed. 1694, 63 S. C. R. 1430, 319 U. S. 732, the sole controversy there decided involved the seniority rights over tracks *leased by various railroads from the Wash. Term.* in Washington, D. C. Therefore, we contend it makes no difference whether the trackage is *owned* or *leased* by the railroad, it is still part of their *operating division,* and *must be in some seniority district,* and the proof shows here that prior to May 1, 1930, this trackage has always been manned by employees of the Eastern, now Nebraska, Division of the Northwestern.

Both the lower Court and the Circuit Court held that the seniority district were confined to a railroad division under one superintendent. We contend there is nothing in the record to substantiate that claim. The Court had to go to the *book of rules* to define a *railroad division* as *one under one superintendent,* but we objected to that on the ground that it was stipulated, and both Courts now hold, that Exhibits "A" and "B" constitute the *whole collective bargaining agreement* and binding upon all employees whether they belong to the union or not. Therefore, the railroad could not, by adopting different rules, change the rights of the employees under the bargaining agent agreement, and our objection on that ground should have been sustained.

The bargaining agreements, Exhibits "A" and "B", do not provide that seniority district is confined to a railroad division under one superintendent.

The Circuit Court found, that after a change was made in the method of handling traffic by the M. & O., that when the new work was put into effect giving the joint traffic of the M. & O. and of the Northwestern over the 31 and a fraction miles from Omaha to Blair and Blair to California Junction and from there to Sioux City, Iowa, to the crews of the Northwestern, the M. & O. employees claimed that they were treated unfairly because all that work was being done by crews of the North Western, and that crews of the M. & O. should get their share of that joint work.

This was true, but that dispute involved only the right of the *M. & O. employees generally* and the right of the *Northwestern employees generally* to do that joint work, and after considerable negotiations it was agreed

that that joint work should be divided on a basis of *25%* to go to the *Omaha* employees and 75% to go to the employees of the *Northwestern as that was inter-railroad service.*

It is our contention, that is as far as that dispute went, that agreement only settled that dispute.

However, our contention has been throughout all these proceedings, that we have no complaint as to that settlement, but that we claim that the bargaining agreements provide, "that where the work goes over two seniority districts the work should be divided between the employees of each seniority district on a mileage percentage basis, as set forth in Sec. 60 of Exhibits 'A' and 'B'," which also provide, "as to trainmen, when trainmen run over more than one freight district, involving more than one *seniority district,* percentage of miles run over each district will govern the assignment of such runs" (Ex. "B", p. 19, printed record).

Exhibit "A" provides, "when conductors run over more than one freight district, under more than one superintendent, percentage of miles run over each district shall govern in assignment of such runs."

The evidence clearly shows that since this new arrangement the Sioux City Division has been doing all the work of the Northwestern from *Omaha, Nebraska,* to *Sioux City, Iowa,* traveling over the 31 and a fraction miles herein in controversy, which includes the *24.7 miles of M. & O. track* under lease to the Northwestern.

It is stipulated in the record that the distance from Omaha to California Junction is approximately 30% of

the total distance from Omaha to Sioux City over these disputed runs, therefore, it has been our contention that we should be entitled to 30% of the 75% that was determined by the agreement between the two roads, above set forth, and the Sioux City Division was entitled to 70% of the work. Both the District Court and the Circuit Court held that these disputes were submitted at the same time, that the settlement was made between the employees of the two railroads, and that settlement decided that these runs were inter-railroad service, and *not inter-divisional runs.*

It is our contention that is not true, that there is not a bit of evidence to show that the controversy involved in this lawsuit was ever *even submitted for decision at any time* to the bargaining agents and the railroad.

The Courts, therefore, erred in holding that those disputes were settled.

We are contending further that, even assuming that said disputes were decided, that if this was done it was done without our knowledge, or consent, and we are not bound by that agreement, for the reason that the bargaining agents, as such, have no right to determine the private property right of the individual employees once they have been acquired and that these seniority rights are such property rights. Both Courts held that these settlements were peculiarly within the rights of bargaining agents, and the railroads and the Courts would not interfere. In this we contend that both Courts were in error, our position being that these rights to do this work, once they have been acquired, are property rights of which petitioners cannot be deprived without notice and an opportunity to be heard under the due process clause of the Fifth Amendment of the United States Constitution.

We contend that this has been determined contrary to this Circuit Court's decision by the 7th Circuit in the case of *Nord v. Griffin,* 86 Fed. (2d) 481.

That it is out of harmony with the recent decisions of the Supreme Court of the United States, that of *Steele v. L. & N. Ry.,* 89 L. Ed. Adv. Opinion 4, page 172, 65 S. C. R. 226, and *Tunstall v. B. of L. F. and E. O. L. No. 76,* 89 L. Ed. 181, 65 S. C. R. 235

The Tunstall case followed the reasoning of the Steele case, both written by the Chief Justice. The two cases involved the right of the railroads and the union as bargaining agents to enter into an agreement depriving *colored employees* of their seniority by entering into an agreement which *discriminated against them.* They were non-union employees because under the rules of the brotherhood they could *not belong* to the *brotherhood.*

In those cases the brotherhoods, purporting to act as representatives for the entire craft of firemen, without informing the negro firemen or giving them an opportunity to be heard, served notice on the respondent railroad and 20 other railroads, operating principally in the southeastern part of the United States, that they desired to amend the existing collective bargaining agreement in such manner as ultimately to exclude all negro firemen from the service. By established practice on the several railroads so notified, only white firemen could be promoted to serve as engineers, and the notice proposed that only promotable (that is white) men should be employed as firemen or assigned to any runs or job or permanent vacancies in established runs, or purpose. The railroads and brotherhoods, as representatives of the craft, entered into a new agreement which provided that more than 50% of the firemen in

each class of service, in each *seniority district,* should be negroes, and until such percentage should be reached all new runs and all vacancies should be filled by white men, and the agreement did not sanction the employment of negroes in any seniority district, in which they were not working. Under this rule the negroes were disqualified and a lot denied their rights, and they were assigned to more arduous employment, longer and less work, in local freight service. The Supreme Court of Alabama held that they had the right to make this kind of an agreement.

The Supreme Court of the United States held, however, that they did not think Congress intended to authorize a labor union, chosen by a majority of the craft to represent the craft, did not intend to confer plenary power on the unions to sanction for the benefit of the members the rights of the craft. *They held that bargaining agents, as such, did not have such power.* This same reasoning was followed in the Tunstall case.

It was further pointed out in those cases that the purpose of the act was to provide for the prompt and ordinary settlement of all disputes concerning *wages, rate of pay, rules and working conditions,* and *not to deprive minority of any rights* that they may have acquired by them.

Again in *Elgin-Joliet & Eastern R. R. v. Burley,* 89 L. Ed. 17, page 1328, in discussing the rights of administrative organization such as the Railroad Adjustment Board, this Court held, "that the bargaining agents *as such* have *not the right to determine* and settle the private property rights of the individual employees, unless it is clearly shown that they were duly authorized by the individual employees to represent them, and they agreed to

be bound by their decisions." This is a long and exhaustive opinion. At page 1340 of the opinion petitioners claimed that "the intention of the act was to make the collective agent the employees' exclusive representative for the settlement of all disputes, whether arising out of the application of such collective agreement or otherwise."

This same statement was again urged by petitioners (p. 1341), but Your Honors said, "that that construction would be contrary to the clear import of its provisions and to its policy."

Again on page 1346 it is stated:

> "The collective agreement could not be effective to *deprive the employees of their individual rights,* otherwise *those rights* would be brought within the collective bargaining power by a mere exercise of that power contrary to the purport and effect of the act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation the act clearly does not contemplate that the rights may be nullified merely by agreements between the *carrier* and the *union.*"

The Circuit Court in its opinion held that the District Court procedure and ruling were in accord with the well-settled law.

Its conclusion was plainly compelled by the decision of this Court in *Div. 525, O. R. C., v. Gorman,* 133 Fed. (2d) 273, where the Court required that such an agreement as was shown in this case was under the stated circumstances subject to recision, and which *through the collective bargaining process.* The facts are that in this case the record shows that there was no change *attempted to be made in the bargaining agreement.*

It is our contention that the decision of the Gorman case is out of harmony with the decision in the Elgin case above referred to, and as a matter of fact Justice Frankfurter relied on the Gorman case in his dissenting opinion. (See top of first paragraph, page 1353, Elgin case.)

The Gorman case is clearly distinguishable also for the reason that it arose in the state of Arkansas, and there was *no prior state decision construing the collective bargaining agreement,* while in this state our Court, in *Rentschler v. Mo. Pac. R. R.,* 126 Neb. 493, 253 N. W. 693, 95 A. L. R. 1, squarely held, following *Piercey v. L. & N. R. Co.,* 198 Ky. 477, 248 S. W. 1042 (1045), 33 A. L. R. 322, that the right secured by these bargaining agents is the individual right of the individual member, and such organization can no more by its arbitrary act *deprive that individual member of his right* so secured than *can any other person.* That the trade union is not the agent of a member for the purpose of *waiving any personal right he may have,* but only for the limited purpose of securing for him, together with all other members, *fair* and *just wages* and *good working conditions.* And further held, an agreement by a member of a trade union to abide by its by-laws, rules and regulations, and to comply with the will of the lawfully constituted majority, does not require a member to submit to the determination of the union any question involving his *personal rights.* Citing other cases. This case further held, that even though the plaintiff submitted his grievance to arbitration, he was not bound thereby, and could appeal to the Court. The Court holding, that under the Nebraska Constitution all such provisions are void as against public policy.

Your Honors held in the case of *Erie v. Tompkins,* 304 U. S. 644, 58 S. C. R. 817, 114 A. L. R. 487, that the

Federal Court was bound by the *local decisions of the state Court.*

And in *Moore v. Ill. Central R. R.*, 312 U. S. 630, 61 S. C. R. 754, 84 L. Ed. 1099, you squarely held that a decision by the *state Court* involving the construction of *these seniority rights* was binding on the Federal Court under the Erie-Tompkins case above referred to.

We contend, therefore, that this Court should grant a Writ of Certiorari to review the decision of the Circuit Court of Appeals, for the reason that it is a matter of great public importance and involved the due process law clause of the Fifth Amendment of the United States Constitution. It involves the further question as to whether or not private property rights of individual members of which seniority rights can be determined by the bargaining agent without notice and an opportunity for the individual employees to be heard, and whether or not the decision in this case is not in conflict with the *Steele* decision, *Tunstall* decision and the *Elgin* case of the United States Supreme Court, and whether or not the decision in the Rentschler case is not binding under the Erie-Tompkins rule on this Federal Court, as held by the *Moore* case.

We again assert that the rights we are seeking to recover here, although we started this suit in May, 1939, *have not as yet been determined.* That the question in controversy was not involved in the so-called settlement of the agreement between the employees of the *M. & O. Railroad,* and employees of the *North Western Railroad,* and the Court should have decided the question as to whether or not its decision was in conflict with the Supreme Court of the United States cases above cited and whether or not it was not bound by the Rentschler decision under the Erie-Tompkins rule.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari, and thereafter reviewing and reversing such decision of said Circuit Court of Appeals.

S. L. WINTERS,
GEORGE O. BURGER,
Counsel for Petitioners.

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In the

Supreme Court of the United States

October Term, 1945

No. 693

BARNEY E. GASKILL, ET AL.,

Petitioners,

vs.

CLAUDE A. ROTH, Trustee of the Property of the Chicago and North Western Railway Company, et al.,

Respondents.

RESPONDENTS' RESISTANCE TO PETITION FOR CERTIORARI

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RESPONDENTS' RESISTANCE TO PETITION FOR CERTIORARI

Respondents resist the petition for certiorari for the following reasons:

1. The decisions of both the District Court and the Circuit Court of Appeals were (upon stipulated evidence) that petitioners, employees of the Chicago and North Western Railway Company, do not have any seniority rights on the line of the Chicago, St. Paul, Minneapolis and Omaha Railway Company between Blair and Omaha, since the trackage is not a part of the Nebraska Division of the Chicago and North Western Railway, as contended by petitioners (Finding 3 of the District Court, Record 197; approved by C. C. A., Supplemental Record, 14-15).

2. That neither the collective bargain agreements sued upon, Exhibits A and B to complaint, nor the union decision of August 19, 1930, awarded to petitioners or the Nebraska Division (C. & N. W.) men any participation in the disputed runs, and that the Courts cannot make a contract for them (Findings, District Court, 3 and 4, Record 197-8; C. C. A., Supplemental Record 14-17).

3. There is involved no question of local law; nor any Federal question, save that collective bargaining is required under the Railway Labor Act, and has been duly observed in this case (District Court conclusions 1, 2, 3, 4, Record 199-200; C. C. A. Opinion, Supplemental Record 17).

ARGUMENT

I.

The decision of the District Court and of the Circuit Court of Appeals both rest upon the issue of fact

decided upon stipulated evidence that petitioners and their group have suffered no violation of their seniority rights as to the trackage on the line of Chicago, St. Paul, Minneapolis and Omaha Railway between Omaha and Blair, Nebraska, because as a matter of fact, that trackage is not a part of the Nebraska Division of the Chicago and North Western Railway as contended by petitioners. That fact issue should be regarded as settled by the decisions of said courts.

II.

Petitioners' suit is based upon the claim that the general collective bargaining agreements, Exhibits A and B attached to the complaint, gave to petitioners and their group seniority rights over said disputed trackage. Both lower courts held that they did not. In addition, both lower courts held that since the collective bargaining agreements and the decision of August 19, 1930, determined that the runs which are involved in this case between Sioux City and Omaha are inter-railroad runs (that is, runs covering two separate railroads), as distinguished from inter-division runs (that is, over two divisions of the same railroad), and such agreement did not award to petitioners or their group any participation in such disputed runs, petitioners have no claim which a court may enforce. The opinion of the Court of Appeals is printed as a part of the record (Supplemental Record, 6-20), and fully reflects that situation. The holding of both courts is that whether or not petitioners should participate in the disputed runs is peculiarly within the province of collective bargaining, and that the court cannot make a bargain for them.

III.

There is no question of local law. *Rentschler v. Mo. Pac. R. R.,* 126 Neb. 493, 253 N. W. 693, relied upon by petitioners dealt with collective bargaining rights already in being, and allowed damages for their violation. Petitioners, not having been awarded the asserted rights by collective bargaining, the Rentschler case has no application. Neither is there any violation of the rule stated in *Elgin-Joliet R. R. v. Burley,* 89 L. Ed. Adv. Opinion 17, page 1328. That case also dealt with rights already accrued, but not with future arrangements. The collective agreement of August 19, 1930 (Record 193-5, 198; also Supplemental Record Opinion of C. C. A., page 8, et seq.), dealt exclusively with rights for the future. Petitioners are still free to pursue their quest by collective bargaining. But until they accomplish their purpose, and have been awarded collective bargaining rights, they have nothing to enforce in court, and have not been deprived of any rights under the Fifth Amendment, or otherwise.

Respectfully submitted,

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Counsel for Chicago and North Western Railway Company.

WM. T. FARICY,

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IN THE

Supreme Court of the United States

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BARNEY E. GASKILL, Et Al., *Petitioners*,

vs.

CLAUDE A. BOTH, Trustee of the Property of the Chicago & Northwestern Railway Company, Et Al., *Respondents*.

BRIEF ON BEHALF OF RESPONDENTS, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF RAILROAD TRAINMEN and GEORGE KIMBALL, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the U. S. Circuit Court of Appeals for the Eighth Circuit is reported in 151 F. (2nd) 366.

JURISDICTION

The petitioners invoke the jurisdiction of this court under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28. U.S.C. 347).

STATUTE INVOLVED

The Railway Labor Act as amended (45 U.S.C., Sec. 151, *et seq.*).

STATEMENT OF THE MATTER

The respondents, Order of Railway Conductors of America, Brotherhood of Railroad Trainmen and George Kimball (hereinafter referred to for brevity as union respondents) oppose the petition for certiorari and respectfully submit that the transcript of record filed in support of the petition discloses no ground for the issuance of the writ.

The opinion of the Circuit Court presents the essential facts, which will not be repeated here. It may be of assistance to the court, however, to make reference to the map, Ex. 3 (Record on Appeal).[1] The "runs" involved are between Omaha, Nebraska and Sioux City, Iowa, and move between Omaha, Nebraska and Blair, Nebraska 23.8 miles over the tracks and rails of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, (which corporation is not a party to this litigation and is hereinafter referred to as the M. & O.); between Blair, Nebraska and California Junction, Iowa, crossing the Missouri River 7½ miles over the tracks and rails of the Chicago & North Western Railway Company (hereinafter referred to as the North Western), and between California Junction, Iowa and Sioux City, Iowa 70.4 miles over the tracks and rails of the North Western. Missouri Valley, Iowa, not shown on the plat, Ex. 3, is 5.9 miles easterly of California Junction. (R. 67, 68).

ARGUMENT

The amended complaint of petitioners alleged:

> "That the trains of the defendant company as run between these two points comprise inter-divisional runs

[1] Record on Appeal in the C.C.A. Unless otherwise indicated all similar references refer to this Record.

by reason of the fact that the trains move over 31.3 miles of the Nebraska division, or 30.7% of the distance between the two points, Omaha and Sioux City, Iowa, and said runs move over 70.4 miles over the Sioux City division, or 69.3% of the distance between the two points. The Nebraska division covers the mileage from Omaha to California Junction while the Sioux City division covers the trackage from California Junction to Sioux City." (R., Par. 18, p. 9)

The crucial and initial question of fact in the case at bar was whether or not the rails and track of the M. & O. Railroad between Omaha, and Blair, Nebraska, constituted a part of the Nebraska Division of the North Western Railroad. If the track between Omaha and Blair was not a part of the Nebraska Division of the North Western, then petitioners clearly had no rights and the other collateral questions which would be involved on a contrary finding need not be considered. The petitioners were employees of the North Western Railroad and under the basic collective contracts, Exhibits "A" and "B", held certain seniority rights which were limited to the Nebraska Division of the North Western Railroad by the express provisions of Sec. 93 of the collective contracts.

When the respective managements of the M. & O. Railroad and the North Western Railroad determined in 1930 to operate these freight trains over the M. & O. rails from Omaha to Blair, and from Blair to California Junction over the rails of the Nebraska Division of the North Western Railroad, and from California Junction, Iowa, to Sioux City, Iowa, over the rails of the Sioux City Division of the North Western Railroad, a controversy immediately arose as between the employees of the M. & O. Railroad and the North Western Railroad with respect to the meaning of the service.

The General Committees representing the employees on the M. & O. and the General Committees representing the employees on the North Western had many hearings, con-

ferences and debates but were unable to reach an adjustment. Under the appropriate provisions of the laws governing the O. R. C. and B. R. T. the dispute was referred to the Chief Executives of the two unions, who were granted and given the power to act and determine the controversy (R. 187, Par. 10). The decision of the Chief Executives was made October 19, 1930, (R. 110, 111) in which it was determined that the work should be divided between the employees of the M. & O. Railroad and the employees of the North Western Railroad on the basis that the ratio of mileage run on each property bears to the total mileage of the run, which was 25% to the M. & O. employees and 75% to the North Western employees.

Assuming, for illustration, that there were two trains each way, each day, there would be under this arrangement three crews of North Western conductors and brakemen and one crew of M. & O. conductors and brakemen. The M. & O. crew would run 25 miles over the M. & O. rails and 75 miles over the North Western rails, and, hence, would "owe" North Western crews 75 miles. This would be "paid" by the three crews of North Western employees, each operating 25 miles over the M. & O. rails, or a total of 75 miles.

The tribunals of the respondent unions, evidenced by the decision of the Chief Executives made October 19, 1930, (R. 110, 111) awarding approximately 25% of the mileage involved in the runs to the M. & O. employees, necessarily determined that none of the North Western employees had any seniority rights over and upon the track and rails of the M. & O. Railroad between Omaha and Blair. The Chief Executives further determined that the runs were not inter-divisional runs, i.e., runs moving over two or more divisions of the same railroad, but on the contrary were "inter-railroad" runs, i.e., runs over and upon the rails of two different railroads.

Rule 93 of each of the collective contracts, Exhibits "A" and "B" (R. 16 and R. 19) expressly provided that the

seniority rights of conductors and trainmen "shall be confined to the division on which they hold rights."

The District Court, upon a full and voluminous record consisting entirely of stipulated facts, found and determined that

> "The Chicago, St. Paul, Minneapolis & Omaha Railway Company track between Omaha and Blair is not a part of the Nebraska Division of the Chicago & North Western Railway Company, but is a part of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, which is a separate corporation." (R., Par. 3, p. 197)

The District Court also found that the decision of the respondent unions "was rendered in good faith and in conformity with the provisions of the constitutions of the respective organizations following a full and mature consideration of the dispute." No charge of fraud, arbitrary or capricious conduct against the respondent union was made in the complaint or on appeal to the Circuit Court and none is made to this Court in connection with the petition for a writ of certiorari.

The findings of fact of the trial court were expressly adopted and concurred in by the Circuit Court of Appeals with the Circuit Court stating:

> "* * * * we think that all that is material to the controversy here is reflected in the findings of the trial court, and that its findings that the Agreement 'limits the seniority rights to the division on which the employee is employed' and that the trackage of the M. & O. used since 1930 for transportation of traffic of both roads between Omaha and Sioux City '*is not a part of* the Nebraska Division of the Chicago and North Western Railway Company but is a part of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, which is a separate corporation,' are sustained by the evidence *and are not clearly erroneous.*"

Under the rule announced in *Anderson vs. Abbott*, 321

U. S. 349, this Court should accept the findings of fact made by the District Court and the Circuit Court that the track and rails of the M. & O. Railroad between Omaha and Blair do not constitute any part of the Nebraska Division of the North Western Railroad.

The petitioners at pp. 17-19 of their brief set forth six Questions Presented, none of which even suggest that the District Court or the Circuit Court was in error in its findings of fact. Petitioners' case and all of the Questions Presented are predicated upon the contention that "the Nebraska Division covers the mileage from Omaha to California Junction * * *." Petitioners seek to ignore the contrary findings made by the union tribunals, the District Court and the Circuit Court, and all of the Questions Presented stem from and are based upon the erroneous hypothesis that the trackage between Omaha and Blair of the M. & O. Railroad has been found to be a part of the Nebraska Division of the North Western Railroad.

It must be apparent that the attempt of petitioners to invoke the jurisdiction of this Court under an allegation that their alleged property rights have been taken away without notice and in violation of the Fifth Amendment is frivolous. Even assuming that petitioners, as employees of North Western, had some seniority rights over the rails of the M. & O. Railroad, such rights arose only by virtue of collective bargaining contracts and were not vested. While seniority rights are valuable rights, they are not "property." They may not be sold, assigned or transferred. The preference in the opportunity to work and in the choice and selection of runs is not something that can be bartered or passed to another by will or inheritance. Seniority does not exist solely and alone by reason of any employer-employee relationship. It is created and exists only by reason of collective contracts. The collective contracts with the North Western (Exhibits "A" and "B") are subject to termination on thirty days' notice (R. 18 and R. 24). In the absence of such a provision in the contracts they would

be subject to termination under the provisions of the Railway Labor Act (Sec. 2, Seventh, and Sec. 6).

The respondent unions, as the certified representatives of the respective classes and crafts of road conductors and road brakemen, had the right to change, alter, amend and make new agreements with North Western. To argue that a collective contract, once made, may never be changed would effectively destroy collective bargaining and would be contrary to the provisions of the Railway Labor Act. That the statutory representative under the Railway Labor Act has the right to change, alter, amend and make new agreements was determined in the case of *Division 525, Order of Railway Conductors vs. Gorman*, 133 F. (2d) 273.

Petitioners further argue that the decision of the Circuit Court is not in harmony with the decision in the case of *Elgin, Joliet & Eastern R. Co. vs. Burley*, 89 L. Ed. 1328. While a petition for rehearing has been granted in that case, the opinion at page 1344, in dealing with the power of the statutory representative, stated:

> "To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances as part of the power to contract 'concerning rates of pay, rules, or working conditions.' *It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.*"

The manning of the service on the runs between Omaha and Sioux City was a new situation which related to the future. As concluded by both the District Court and the Circuit Court the problem of determining this question was one peculiarly within the province of collective bargaining.

The doctrine announced in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, has no application here, as the question

as to the rights, powers and duties of a statutory representative under the provisions of the Railway Labor Act involves the construction of a federal statute. In any event, the Nebraska case of *Rentschler vs. Missouri Pacific R. Co.*, 126 Neb. 493, 253 N. W. 694, relied upon by petitioners, is not applicable here. The parties to this litigation were not parties in that case; the subject matter was entirely different and the case merely held that when a collective contract is negotiated an individual employee who is a member of the class and craft involved may sue the carrier for breach of the contract while it is in effect.

We respectfully submit that the petition fails to disclose any grounds for the issuance of the writ.

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IN THE

Supreme Court of the United States

October Term, 1945

No. 926

BARNEY E. GASKILL, Et Al,
Petitioners,

vs.

CLAUDE A. BOTH, Trustee of the Property of the Chicago & North Western Railway Company, Et Al,
Respondents.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF

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PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF

In reply to respondents' brief in opposition to Petition for Writ of Certiorari, petitioners respectfully submit the following:

I.

The findings of fact of the District Court and the Circuit Court of Appeals, if to any extent concurrent, are *clearly erroneous.* This was manifestly demonstrated in the petition for the issuance of the writ. While it is true

that concurrent findings of two lower Courts are generally regarded as conclusive, this rule is not followed where, as in the case at bar, the findings are *clearly erroneous* (*United States v. Appalachian Electric Power Co.*, 311 U. S. 377). Nor is this rule strictly followed in cases taken to the Supreme Court because of conflict of decisions in different Circuit Courts of Appeal (*Sanitary Refrigerator Co. v. Winters*, 280 U. S. 445; *Thompson Spot Welder Co. v. Ford Motor Co.*, 265 U. S. 445). Petitioners pointed out such a conflict in the Petition for the Writ (page 28, printed Petition).

II.

Petitioners submit that this rule should not be invoked in opposition to issuance of the writ but if invoked at all should be presented and argued after the writ is issued and the matter is before the Supreme Court on the merits. For in the very case, *Anderson v. Abbott*, 321 U. S. 349, relied on by respondents, Order of Railway Conductors, Brotherhood of Railroad Trainmen and George Kimball, the Supreme Court, while accepting the findings of fact of two lower Courts, reversed the decisions below. In *Brewer-Elliott Oil Co. v. United States*, 260 U. S. 77 (80), cited in *Anderson v. Abbott*, supra, the Supreme Court stated: "Voluminous evidence of navigability was introduced and both the District Court and the Circuit Court of Appeals found the river at the place non-navigable. . . . Neither the argument nor the record discloses any ground which can overcome the weight which the findings of two courts must have with us." How could the Supreme Court fully and adequately determine the weight the decisions below are to be afforded unless the writ would issue and argument be had? Also cited in *Anderson v. Abbott*, supra, was *Alabama Power Co. v. Ickes*, 302 U. S. 464 (477), in which the Supreme Court reaffirmed the rule set out above. In

that case, however, both parties agreed to the evidence, but there were sharp differences as to the reliability. The disagreement was over the ultimate conclusions upon navigability drawn from the uncontradicted evidence. The Court said, in the *Alabama Power Co.* case, it would not accept as unassailable the findings below without substantial support in the evidence.

III.

The findings of fact of the two lower Courts certainly were not concurrent in their entirety. The District Court in its Findings of Fact (pages 197, 198, original record) made no separate finding concerning the 7.5 miles of trackage between Blair and California Junction. The Circuit Court of Appeals, faced with the fact that it had been stipulated that this trackage was part of the Nebraska Division, in order to decide against the petitioners found it necessary to go outside the issues of the case and claim that whatever damage was suffered was offset by work done by the petitioners over 5.9 miles of trackage between California Junction and Missouri Valley. This, in spite of the fact that the record shows this 5.9 miles was Nebraska Division (page 162, original record).

IV.

There *is* a question of local law. This is *not* an argument about the future and petitioners are *not* asking the Courts to make a bargain for them. Seniority rights are acquired on trackage, both leased and owned; not on "runs". The Nebraska Division men operated exclusively over the disputed trackage, both owned and leased for years by the North Western Railroad, prior to arbitrary action of the North Western Railroad giving rise to this controversy (page 141, original record), while the bargaining agreements (Exhibits A and B) were in full force

and effect. This fact alone conclusively shows petitioners had *existing* seniority rights—property rights—which they are attempting to enforce. *Rentschler v. Mo. Pac. R. R.*, 126 Neb. 493, 253 N. W. 693, and *Elgin-Joliet R. R. v. Burley*, 89 L. Ed. Adv. Opinon 17, page 1328, support them in their attempt. The so-called collective agreement of August 19, 1930 (pages 193-5, 198, original record), did not, and under the *Rentschler* and *Elgin* cases could not affect the *prior-existing* seniority rights of the petitioners.

V.

Petitioners sincerely, firmly and positively deny that their Petition for the Issuance of a Writ of Certiorari is in the least respect frivolous. Rather, petitioners, relying on the decision, *Rentschler v. Mo. Pac. R. R.*, supra, holding that seniority rights are property rights, request the Supreme Court to exercise a sound judicial discretion to hear and decide this case of great public importance and thereby protect the petitioners' right, guaranteed by the Fifth Amendment to the Constitution of the United States, which have been flagrantly violated by the arbitrary action of the North Western Railroad.

Respectfully submitted,

S. L. Winters,
George O. Burger,
Counsel for Petitioners.

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PETITION FOR REHEARING ON ORDER DENYING CERTIORARI

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully request this Honorable Court to review its order denying certiorari, and in support thereof submit the following:

I.

To deny certiorari at this time would present a situation where this Court would exercise its judicial discretion to grant a writ of certiorari on the petition of the respondent railroad to determine a preliminary question of adjective law and deny certiorari in the same case when review is sought on the merits of the controversy involving substantive rights of which petitioners claim to have been deprived in violation of the Fourteenth Amendment to the Federal Constitution. The decision of this Court on the jurisdictional question is reported in 315 U. S. 442. Petitioners submit that a matter of much greater general importance is presented here than was presented in the former appeal and the urgency of review is proportionately greater. In this present period of labor strife will not this Court accept the opportunity to clarify the unsettled questions of law regarding the rights and duties of railroads, as employers, and of labor unions, as the bargaining agents of individual employees?

II.

There has been no judicial determination in this case of the questions of law raised by petitioners, namely: Can a railroad labor union, a railroad, or both, without the consent of the individual employees, for other than economic or related reasons, deprive the employees of their seniority rights? Are seniority rights property rights so that they cannot be taken away by the collective bargaining process without the consent of the individual employees? Petitioners contended from the very beginning that seniority rights are property rights and rely on the decision of the Supreme Court of the State of Nebraska, *Rentschler v. Mo. Pac. R. R.*, 126 Neb. 493, 253 N. W. 693, 95 A. L. R. 1, which holds "that these

seniority rights were property rights, and once acquired could not be taken away from them by any agreement between the railroad and bargaining agent." This decision is binding on the federal courts by the decision of *Moore v. Illinois Central R. R.*, 312 U. S. 630, 61 S. C. R. 754, 84 L. Ed. 1099. These decisions have been ignored by the courts below and are not mentioned in either opinion. Both lower courts rely on *Division 525, Order of Railway Conductors v. Gorman*, 133 Fed. (2d) 273, which arose in the State of Arkansas, where there had been no prior local decision. *If petitioners are wrong in this contention, why cannot they obtain a specific judicial finding to that effect?* This Court in the recent decision, *Elgin, Joliet & Eastern Railway Company v. Burley*, —— U. S. ——, 90 L. Ed. ——, —— S. Ct. ——, decided March 25, 1946, adhered to the opinion filed after the first argument, reported in 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282, and held that a determination by the Adjustment Board of a dispute brought before it by a union as collective bargaining agent is not binding on the individual employees unless they gave their consent, express or implied. In view of this decision could petitioners be bound by a collective bargaining agreement when the dispute has not been decided by the Adjustment Board and the bargaining agent did not purport to act in behalf of the Nebraska Division men as such and petitioners did not authorize any such representation. If, as respondents claim, the agreement of 1930 deprived petitioners of the right to do the North Western work on the disputed trackage, could the authority be implied when the unions, on their own initiative, requested the railroad to make the changes complained of? The collective bargaining agent, as such, has no authority to act as respondents claim.

III.

Petitioners feel that an explanation of a history of the litigation and of the manner in which the trial was conducted, if emphasized, would present to this Court the urgent necessity to exercise its supervisory powers and review the decisions below. The original petition was filed May 8, 1939, in the U. S. District Court for the State of Nebraska. The respondent, Chicago and North Western Railroad Company, took the position that the petition did not allege the necessary jurisdictional amount and District Judge Donahoe, sustaining respondent's contention, dismissed the action. On appeal to the Circuit Court of Appeals, the decision of dismissal was reversed, 119 F. (2d) 105. On the petition of the North Western Railroad the Supreme Court granted a writ of certiorari and after hearing remanded the case to the District Court without prejudice to an application for leave to amend the bill of complaint, 315 U. S. 442. Amended pleadings were filed and *the case was submitted entirely on stipulated facts and documents.* At the time the facts were submitted and argument made in the District Court, petitioners entertained little doubt that District Judge Donahoe would hold as a matter of fact that prior to the so-called collective agreement of August 19, 1930, petitioners held seniority over the entire disputed trackage from Omaha to California Junction. The argument at the trial centered around the proposition whether or not the so-called collective agreement was in fact a collective bargaining agreement between employer and bargaining agent and, if it was, whether it settled or attempted to settle the question as to what seniority district or division of the North Western was to do the work on the disputed trackage; and finally, if such an attempt was made, whether the railroads or bargaining agents or both had

the right to settle such a question without the consent of the aggrieved employees. This final proposition has not as yet been passed on.

Bear in mind that a complete trial has not been had. Petitioners submit that an accounting based on the books of the railroad would, in addition to showing the actual damage suffered, substantiate their claim that they held seniority on the disputed trackage which was for years recognized by the railroad.

The courts below have considered as evidence the book of rules for the government of the Operating Department of the North Western, received over the objection of counsel for petitioners (original Record, p. 100), and in so doing have failed to recognize the distinction between a seniority district or division and an operating division of the railroad. The trackage between Omaha and Blair owned by the M. & O. Railroad and leased by the North Western may be part of an M. & O. operating division so that the M. & O. would regulate traffic, but regarding the work done by the North Western, it is part of the Nebraska seniority division of the North Western on which petitioners hold seniority.

The lower courts have received certain affidavits originally presented by respondents on the preliminary question of jurisdiction and have considered several statements contained in them as evidence, although they were introduced, over the objection of counsel for petitioners, for the sole purpose of explaining certain documents (original Record, pp. 160, 161). Judge Woodrough, in his statements concerning the 5.9 miles between California Junction and Missouri Valley (p. 18, C. C. A. Record), relies on the affidavit of O. G. Jones, an official of the

respondent Brotherhood of Railroad Trainmen and a former member of the Sioux City Division (3rd paragraph, p. 169, original Record). The statement of Mr. Jones is contradicted in his own affidavit (last paragraph, p. 162, original Record) and is contrary to stipulation (p. 141, original Record).

Both the District Court and the Circuit Court have the mistaken impression that in order to enforce seniority rights, the employees must be accorded such rights every time a new run is inaugurated or a new service is begun. They assert that petitioners were not "cut in" on the business when the Omaha-Sioux City run was routed via Blair and hence cannot complain. They gathered this impression from respondents' briefs and oral argument, for the entire record is authority for the proposition that seniority rights are acquired on trackage and the employees of the seniority division holding seniority rights over described trackage have the right to man the trains operating over that trackage—no matter where the trains are going to or coming from and no matter when a particular run was commenced.

IV.

If the opinion of the Circuit Court is allowed to remain unassailed, it will stand as authority to the effect that seniority rights of railroad employees, for which railroad employees have struggled for years, are insignificant, illusory rights, which may be abrogated or modified by labor unions or railroads, even though the employee does not belong to a union or has not consented. It will stand for the proposition that seniority rights cannot be acquired on leased trackage. The Circuit Court certainly did not intend to hold this, but there is no other conclusion to be drawn.

With no intention to question the integrity and good faith of the trial Judge or appellate Judges, petitioners respectfully submit that the decisions below, if undisturbed, would result in an abuse of the pre-trial process and trial on stipulated facts and evidence provided in the Federal Rules of Procedure. A careful and studious examination of the voluminous record will disclose that many crucial findings of fact are contrary to express stipulation. All petitioners request is an opportunity to present at length the justice of their claim to overcome the absolutely unforeseeable departure from the evidence and to convince this Court that a complete trial should be had, and, if necessary, oral testimony be taken before petitioners are forever barred.

Respectfully submitted,

S. L. WINTERS,
GEORGE P. BURGER,
Attorneys for Petitioners.

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CERTIFICATE OF COUNSEL

S. L. Winters, one of the attorneys in the above entitled proceeding, hereby certifies that this petition is filed in good faith and not for delay and he believes it to be meritorious.

S. L. WINTERS,
Attorney for Petitioners.